

BEFORE THE

DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Establishment of)
Public Rights Stage(s) / Flow(s) for the Little)
Plover River, Portage County.)

IP-WC-2009-00223

FINDINGS OF FACT AND ORDER

The Department, under the authority granted pursuant to s. 31.02, Stats., and in response to a request of the following conservation groups; River Alliance of Wisconsin, Wisconsin Wildlife Federation and Trout Unlimited, herein establishes a minimum Public Rights Flow(s) (PRF) for the Little Plover River (LPR) located in Portage County, whereby the PRF may not be lowered, with exception to natural changes in precipitation (droughts). The PRF is that water quantity or level necessary to protect public rights and interests in the LPR.

FINDINGS OF FACT

1. On April 24, 2007, River Alliance of Wisconsin, Wisconsin Wildlife Federation and Wisconsin Trout Unlimited, submitted a petition to the Wisconsin Department of Natural Resources (WDNR) requesting the WDNR establish PRF(s) for the LPR to preserve and protect public rights and interests in said waterway. Their petition also requested the Department to establish an interim emergency PRF equivalent to the 7-day, 10 year low flow, $Q_{7,10}$.
2. The WDNR established a minimum healthy flow for the LPR through informal file memo. This flow of 4 cubic feet per second, (cfs), at Eisenhower Road (CTH R) was developed by the WDNR to establish a goal for the LPR Workgroup efforts to restore a healthy flow in the LPR. This data and analyses were the base information used to establish the public rights flow.
3. The LPR is located in Sections 13, 14, 15 and 24, T23N, R8E, and in Sections 18 & 19, T23N, R9E, (Towns of Plover and Stockton, Village of Plover) in Portage County.
4. The LPR has been declared a navigable water body pursuant to s. 30.10, Stats.
5. The LPR is classified as a Class I Trout stream as identified in s. NR 1.02(7)(b)1., Wis. Adm. Code. "A class I trout stream is a stream or portion thereof with a self-sustaining population of trout. a. Such a stream contains trout spawning habitat and naturally produced fry, fingerling, and yearling in sufficient numbers to utilize the trout habitat, or b. Contains trout with 2 or more age groups, above the age of one year, and natural reproduction and survival of wild fish in sufficient numbers to utilize the available trout habitat and to sustain the fishery without stocking."

6. The LPR is defined as an "Area of Special Natural Resource Interest" pursuant to s. 30.01(1am)(b), Stats., and NR 1.05(3)(b), Wis. Adm. Code.
7. LPR flows are primarily dependent on ground water discharge, particularly during normal base flow conditions.
8. The United States Geological Survey (USGS) maintained a stream flow monitoring gage on the LPR at Hoover Road from 1959 to 1987 and at Kennedy Road from 1959 to 1975.
9. The Department's Bureau of Fisheries Management guidance for streams with 10 cfs or less, average summer flow (June 1 – September 30), identifies the minimum stage, PRF, for fishery interests is the ordinary high water mark (OHWM) of the stream. For intermediate streams from 10 cfs to 25 cfs average summer flow, the fisheries interest stage is below the OHWM level and must be established by the fish manager. Average summer flow for the LPR, as calculated by the USGS gage data at Hoover Road, from 1959 to 1987 is 9.975 cfs.
10. Historic Department PRF determinations on navigable streams do not allow the flows to be less than the 7-day, 10 year low flow ($Q_{7,10}$). The $Q_{7,10}$ flow in streams is used to determined wasteload allocations for WPDES dischargers and is a minimum flow that must be in a stream to protect water quality. Although water quality is the determining factor for compliance with discharge permit conditions it does not take into account the available fish and wildlife habitat present at that particular flow. The following are USGS calculated 7-day, 10 year low flows at Hoover Road, I39, Eisenhower Road and Kennedy Road; Low-Flow Characteristics of Streams in the Central Wisconsin River Basin, Wisconsin. Water Resources Investigations Open-File Report 81-495.

| <u>Location</u> | <u>$Q_{7,10}$ flow</u> |
|-------------------------|-----------------------------------|
| Kennedy Road | 1.2 cfs |
| Eisenhower Rd., (CTH R) | 2.2 cfs |
| I39 | 4.2 cfs |
| Hoover Road | 4.8 cfs |

11. The Public Rights Flow should be of sufficient volume and depth to protect fish and wildlife (including aquatic life), and their respective habitats. One method used to determine this flow is the Montana (Tennant) method Instream Flows for Riverine Resource Stewardship, Revised Edition, The Instream Flow Council, 2004. According to the Montana Method the minimum flows required to maintain good habitat for aquatic life was 30 % of the minimum flow should be between 30 and 60 percent of the annual flow (maf). For LPR locations:

| Location | maf | 30% maf | 60% maf | $Q_{7,10}$ |
|-----------------|--|----------|----------|------------|
| Kennedy Road | 4.03 | 1.21 cfs | 2.42 cfs | 1.2 cfs |
| Eisenhower Road | No gage at this location, no data to support a maf | | 2.2 cfs | |
| I39 | No gage at this location, no data to support a maf | | 4.2 cfs | |
| Hoover Road | 10.26 cfs | 3.08 cfs | 6.16 cfs | 4.8 cfs |

12. Department Fish Managers have determined through stream monitoring, that the minimum low flow of the LPR to prevent Trout mortality relating to temperature at CTH R is 4 cfs. Assessment of the Brook Trout Population in the Little Plover River, Final Report, May 2007. Tom Meronek, Fisheries Biologist.

13. Department Fish Managers have determined through stream survey and analysis, that the minimum flows in the LPR necessary to utilize available aquatic habitat in the vicinity of CTH R/Eisenhower Road to be 3 cfs. Department of Natural Resources, West Central Region, 2006 Habitat Modeling. Provost, Meronek.
14. Department Fish Managers have determined that targeting biomass levels of 75 to 125 is desirable and allows trout recruitment to fluctuate normally. According to published studies (Hunt 1979), this correlates to flows of 4 cfs., at CTH R. Assessment of the Brook Trout Population in the Little Plover River, Final Report, May 2007. Tom Meronek, Fisheries Biologist.
15. University of Wisconsin, Stevens Point, Center for Watershed Science and Education, College of Natural Resources, collected stream flow data at Hoover, CTH R (Eisenhower Road) and Kennedy roads during the periods of 2005 to 2008. Data collection of flow values over time has enabled UWSP to calculate a regression analysis relating flow values at Kennedy, Eisenhower (CTH R), I39 and Hoover. From the regression analysis, flows at Eisenhower (CTH R) of 4.0 cfs correlate to flows of 2.2 cfs at Kennedy, 5.8 cfs at I39, and 6.8 cfs at Hoover. Technical Memorandum #15, Little Plover River Discharge at Eisenhower and Relation to other Stations. Clancy, Kraft, Mechenich, Macholl.

CONCLUSIONS OF LAW

The department has authority under Section 31.02 (1), Wis. Stats. to regulate and control the levels and flow of water in the interest of public rights in navigable waters, and in accordance with the foregoing Findings of Fact, to issue an order establishing a public rights flow(s) for the Little Plover River.

The Department has complied with Section 1.11, Wis. Stats., Wisconsin's Environmental Policy Act and chs. NR 102, 103 and 1.95, Wis. Adm. Code.

ORDER

THE DEPARTMENT THEREFORE, ORDERS:

The public rights flow for the Little Plover River at Kennedy Road is 1.9 cfs.
The public rights flow for the Little Plover River at CTH R is 4.0 cfs.
The public rights flow for the Little Plover River at I39 is 5.8 cfs
The public rights flow for the Little Plover River at Hoover Road is 6.8 cfs.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that the Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions shall be filed.

To request a contested case hearing pursuant to Wis. Stat. § 227.42, you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for hearing on the Secretary of the Department of Natural Resources, P.O. Box 7921, Madison, WI, 53707-7921.

A request for contested case hearing must follow the service requirements found in Wis. Admin. Code §NR 2.03 and the form prescribed in Wis. Admin. Code §NR 2.05(5), and must include the following information:

1. A description of the Department's action or inaction which is the basis for the request;
2. The substantial interest of the petitioner which is injured in fact or threatened with injury by the Department's action or inaction;
3. Evidence of a lack of legislative intent that this interest is not to be protected;
4. An explanation of how the injury to the petitioner is different in kind or degree from the injury to the general public caused by the Department's action or inaction;
5. That there is a dispute of material fact, and what the disputed facts are;
6. The statute or administrative rule other than s. 227.42, Wis. Stats., which accords a right to a hearing.

This determination is final and judicially reviewable. For judicial review of a decision pursuant to ss. 227.52 and 227.53, Wis. Stats., you have 30 days after the decision to file your petition with the appropriate circuit court and to serve the petition on the Secretary of the Department of Natural Resources. The petition must name the Department of Natural Resources as the respondent.

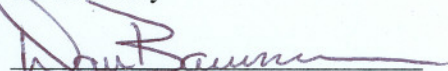
Reasonable accommodation, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request.

Dated at Eau Claire, WI, March 23, 2009

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

For the Secretary

By



Daniel G. Baumann, P.E.
Regional Water Media Leader